

HOUSE BILL 798
By Fitzhugh

AN ACT to amend Tennessee Code Annotated, Title 35, Chapter 3, relative to investments under the prudent man rule.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 35-3-117, subsection (f)(1), is amended by deleting the punctuation “.” after the words “or thereafter created” at the end of the subsection and by adding the following new language:

, and shall apply to all decisions by a fiduciary regarding the allocation and nature of investments of trust assets made with respect to such trusts or agency accounts since their inception.

SECTION 2. Tennessee Code Annotated, Section 35-3-117, is further amended by adding the following as new subsections (i), (j) and (k):

(i) In the absence of express provisions to the contrary in the governing instrument, a fiduciary will not be liable to the beneficiaries or to the trust with respect to a decision regarding the allocation and nature of investments of trust assets unless the court determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused its discretion merely because the court would not have exercised the discretion in the same manner.

(j) If a court determines that a fiduciary has abused its discretion regarding the allocation and nature of investments of trust assets, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require a distribution from the trust to the beneficiary in an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position, taking into account all prior distributions to the beneficiary.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions, taking into account all prior distributions, by requiring the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying paragraphs (1) and (2), to restore the beneficiaries, the trust, or both, to the position they would have occupied if the fiduciary had not abused its discretion, the court may require the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(k) Upon a petition by the fiduciary, the court having jurisdiction over the trust or agency account shall determine whether a proposed plan of investment by the fiduciary will result in an abuse of the fiduciary's discretion. If the position describes the proposed plan of investment and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of

how the income and remainder beneficiaries will be affected by the proposed plan of investment, a beneficiary who challenges the proposed plan of investment has the burden of establishing that it will result in an abuse of discretion.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.